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No. 09-116

Supreme Court, U.S.
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In The
Supreme Court of the United States

VALER V. SECAREA, JR.,

Petitioner,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, KALYANAM SHIVKUMANR, M.D., DAVID CESARIO, M.D., CHARLES SWERDLOW, M.D.,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth District, Division Three

BRIEF OF RESPONDENT CHARLES SWERDLOW, M.D. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES AND INTERESTED PERSONS

The following listed persons and entities may have an interest in the outcome of this case:

1. Valer S. Secarea, the Petitioner-Appellant and Plaintiff in the underlying case;
2. The Regents of the University of the State of California, Kalyanam Shivkumar, M.D., and David Cesario, M.D., Respondents and Defendants in the underlying case;
3. Charles Swerdlow, M.D., Respondent and Defendant in the underlying case;
4. Southern California Physicians' Indemnity Exchange (SCPIE) and The Doctors Company, Dr. Swerdlow's medical malpractice insurers;
5. Irvine Regional Hospital and Medical Center, Defendant in the underlying case and party to the state court appeal but not a party to this proceeding;
6. Rick Swartzentruber, M.D., Allen Schwartz, M.D., and Vital Signs, Inc. are Defendants in the underlying case, not parties to the state court appeal or this proceeding.

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY	1
	A. The Second Amended Complaint	1
	B. Motions for Summary Judgment	3
	C. Opposition to the Motions	5
	D. The Superior Court's Ruling	7
	E. Opinion of the Court of Appeal	8
III.	REASONS FOR DENYING THE WRIT	9
	A. There Is No Evidence Mrs. Secarea Was the Victim of Medical Experimentation	9
	B. No Issue of Federal Law is Presented	11
	C. Petitioner May Not Rely on Evidence Improperly Submitted to This Court	12
	D. There is No Split in Authority on a Question of Federal Law in This Case. Petitioner is Seeking Review of the Factual Findings of the Trial Court	13
	E. Certiorari Should Be Denied Because Petitioner's Claim is Factbound and Unlikely to Recur	13
	F. None of Petitioner's Four Questions Relate to Dr. Swerdlow	14
IV.	CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Buford v. U.S., 532 U.S. 59 (2000) 14

Cobbs v. Grant, 8 Cal. 3d 229 (1972) 11

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 14

Spencer v. Lee, 864 F.2d 1376 (1989) 14

UNITED STATES CONSTITUTION

Article III, Section 2 11

RULES

Supreme Court Rule 10 1

Supreme Court Rule 10(a) and (b) 13

Supreme Court Rule 12(7) 12

OTHER AUTHORITIES

Rehnquist, Justice William H. *The Supreme Court How It Was How It Is*, New York: William Morrow and Company, Inc., 1987 11

I. INTRODUCTION

This is an action for medical malpractice in which petitioner Valer V. Secarea, Jr. ("Secarea") alleges that the negligence of the defendants resulted in the death of his wife. The Opinion of the California Court of Appeal, Fourth District, Division Three affirming summary adjudication of Secarea's wrongful death cause of action against Dr. Swerdlow and others is fact-specific to this case. It contains no new legal principles and has no precedential effect because it was ordered not to be published. No "compelling reasons" exist for the granting of this Petition. (Supreme Court Rule 10) Petitioner has not demonstrated the existence of any conflict concerning any federal question among either state or federal courts. In fact, none of the four issues in the Petition presents a federal question as to respondent, Dr. Swerdlow. Since no federal question is presented as to Dr. Swerdlow, there is no basis upon which Certiorari might be granted as to him; he therefore respectfully requests that Secarea's Petition be denied.

II. COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Second Amended Complaint

Petitioner's Second Amended Complaint ("Complaint") (Petitioner's Appendix, B-1 – B-156) alleges a multitude of causes of action, most of which were disposed of by Demurrer and Motion to Strike. Reduced to its essence, the 156-page Complaint

alleges that Secarea's wife suffered from a long-standing cardiac arrhythmia. She engaged the services of Dr. Swerdlow, a Board certified cardiologist and cardiac electrophysiologist in private practice in Los Angeles, to perform a cardiac ablation at UCLA Medical Center. Dr. Shivkumar, also a cardiac electrophysiologist, was to assist in the procedure. As described by the Court of Appeal, cardiac ablation involves inserting a wire into the patient's heart via blood vessels. Electrodes on the tip of the wire determine the location of the "short circuit" in the heart which interrupts the heart's normal rhythms. Once the location is determined, energy is applied to destroy a small amount of heart tissue. This results in the formation of lesions that halt the abnormal electrical disturbances from that area and restore the heart's normal rhythm. (Petitioner's Appendix, A-34)

Unknown to Secarea, Dr. Shivkumar did not assist in the procedure; rather, Dr. Cesario, a cardiac fellow at UCLA, assisted in Dr. Shivkumar's place. Also unknown to Secarea, the physicians used an anesthesiologist's temperature probe in Mrs. Secarea's esophagus during the procedure. The Complaint alleges that the use of that probe constituted medical experimentation to which Mrs. Secarea did not consent. Dr. Cesario's involvement in the procedure is described as "ghost surgery." Secarea claims that the manner in which the procedure was performed was designed to permit the physicians to engage in medical experimentation and not to provide appropriate medical care to his wife.

The Complaint further alleges that Secarea's wife sustained an atrio-esophageal fistula (an opening between the atrium of her heart and her esophagus) as a result of the physicians' negligence and medical experimentation. That atrio-esophageal fistula resulted in Mrs. Secarea's death approximately a month after the cardiac ablation.

B. Motions for Summary Judgment

Dr. Swerdlow and other defendants filed Motions for Summary Judgment. Dr. Swerdlow's Motion was supported by the Declaration of Douglas L. Packer, M.D., Board certified by the Board of Internal Medicine in Internal Medicine, Cardiology, and Cardiac Electrophysiology. (Petitioner's Appendix, B-171, et seq.) Dr. Packer has been a full Professor of Medicine at the Mayo School of Medicine since 1998. His practice centers on cardiac electrophysiology and research. Dr. Packer's Declaration established his familiarity with the standard of care applicable to the care and ablative treatment of cardiac arrhythmias. (Petitioner's Appendix, B-173 – B-174)

After describing his review of Mrs. Secarea's medical records and the relevant medical facts, Dr. Packer opined that Dr. Swerdlow met the applicable standard of care. Mrs. Secarea was an appropriate candidate for the procedure performed. Based on Dr. Swerdlow's charting and the Consents signed by Mrs. Secarea, the patient was informed of the risks of the procedure, including the risk of death. The technique

used for performance of the ablation was one used in major cardiac treatment centers and within the standard of care. The use of the anesthesiologist's temperature probe was within the standard of care. And, finally, to a reasonable medical probability, Mrs. Secarea's death was not caused by any negligence on the part of Dr. Swerdlow. (Petitioner's Appendix, B-176 – B-178)

In addition to the expert testimony provided by Dr. Packer, co-defendants also submitted an expert Declaration. Their expert, Dr. Natale, was also extremely well-qualified as to the performance of cardiac ablations. (Petitioner's Appendix, B-181 – B-183) Dr. Natale also concluded that the defendants had met the standard of care in their care and treatment of Mrs. Secarea and caused no harm to her. (Petitioner's Appendix, B-188 – B-194)

Dr. Natale's Declaration establishes the credentials of Dr. Cesario, whom petitioner repeatedly refers to as a "student." Dr. Cesario had graduated from medical school 8 years before the performance of this procedure. He had completed an internship and cardiology residency. He was a fellow in electrophysiology at the time of Mrs. Secarea's procedure; fellows routinely assist in the performance of catheter ablations. Dr. Cesario's curriculum vitae "demonstrates that he is a well-credentialed cardiologist and electrophysiologist." (Petitioner's Appendix, B-194)

In combination, the defendants' experts presented a compelling (and ultimately unrefuted) case

that all defendants met the applicable standard of care and did not cause any injury to Mrs. Secarea.

C. Opposition to the Motions

Secarea submitted no expert Declaration in opposition to Defendants' Motions. Instead, he submitted his own Declaration detailing his wife's communications with Drs. Swerdlow and Shivkumar, her understanding – and his – concerning the manner in which the procedure would be performed and the identity of the physicians to be involved. (Petitioner's Appendix, B-197, et seq.)

The focus of Secarea's Opposition was his continuing claim that Mrs. Secarea was an unwitting and unwilling participant in a medical study being conducted by defendants. He bases this claim on the medical journal Abstract appearing at Petitioner's Appendix, B-243. Without any supporting evidence (and certainly without any supporting expert evidence), Secarea assumes that his wife was part of that study. That assumption is refuted by email correspondence from Dr. Swerdlow to Secarea after Mrs. Secarea's death (Petitioner's Appendix, B-233) in which Dr. Swerdlow states that 13 patients had undergone ablation using a temperature probe prior to Mrs. Secarea's procedure. The Abstract reported on a study of 12 patients. The study established that using a temperature probe in the patient's esophagus during cardiac ablation permitted the cardiologist to monitor the referred heat in the patient's esophagus.

Use of the temperature probe was determined to be useful in an effort to avoid atrio-esophageal fistula in performance of cardiac ablation. This information establishes that the physicians had completed their study prior to Mrs. Secarea's procedure and that they had determined use of the temperature probe was potentially beneficial in attempting to avoid atrio-esophageal injury.

Secarea's Declaration purported to express medical opinions as to the manner in which the procedure was performed, the claimed "experimental" nature of the use of the temperature probe, an alleged deviation between the consented to procedure and the one actually performed, and the supposed failure of the physicians to obtain Mrs. Secarea's consent to participate in "medical experimentation."

Secarea also attached copies of the multiple Consents signed by his wife prior to the performance of the cardiac ablation. Among the various Consents which Mrs. Secarea signed were documents in which she acknowledged the potential risk of death from undergoing this procedure. She acknowledged the potential risk of esophageal injury from undergoing the procedure. She consented to the performance of the procedure by Dr. Swerdlow and Dr. Shivkumar and such other physicians as they might involve. Contrary to Mr. Secarea's claim, there is no documentation that Mrs. Secarea restricted her consent as to the identity of the persons to be involved in her procedure. There is no documentation that she was

not willing to have a cardiac fellow involved in her procedure. (Opinion, Petitioner's Appendix, A-51)

D. The Superior Court's Ruling

In granting the Motions for Summary Judgment (Petitioner's Appendix, A-17, et seq.), the Superior Court found that UCLA and the doctors had met their statutory burden of proof, but that plaintiff had not. (Petitioner's Appendix, A-23 – A-26) The Court sustained the defendants' objections to plaintiff's Declaration, primarily on the grounds that Secarea was not competent to express the expert opinions contained in his Declaration because he is not a medical doctor. (Petitioner's Appendix, A-26 – A-27)

As to the informed consent issue, the Court found that Mrs. Secarea was provided with information concerning the risks of the procedure, including the risks of esophageal injury and death. The Superior Court further found that Secarea did not meet his burden in opposing the Motion. (Petitioner's Appendix, A-23, et seq.)

Secarea submitted only his own Declaration concerning the events which he had observed. He did not submit the Declaration of a cardiologist, a cardiac surgeon, an electrophysiologist, or any other competent medical expert to testify:

- That the procedure performed on Mrs. Secarea was a medical experiment;

- That the procedure performed on Mrs. Secarea was different from the one to which she consented;

- That the use of the temperature probe represented medical experimentation rather than simply an effort to avoid a known risk of this procedure;

- That the procedure was improperly performed by any of the defendants;

- That there was a breach of the standard of care by any defendant; or

- That the substitution of a medical fellow for Dr. Shivkumar represented improper medical practice.

Secarea's failure to produce any expert testimony in opposition to the defendants' Motion resulted in judgment being entered against him.

E. Opinion of the Court of Appeal

In an unreported Opinion (Petitioner's Appendix, A-29, et seq.), the Court of Appeal affirmed the summary adjudication of Secarea's wrongful death claim in favor of The Regents of the University of California and Drs. Shivkumar, Cesario, and Swerdlow. As relevant to Secarea's claim of medical experimentation, the Court found that defendants had established that the use of the probe was not "experimental or investigational," and that Secarea presented no

competent evidence in rebuttal. (Petitioner's Appendix, A-60)

The Court of Appeal reversed the summary judgment as to the wrongful death cause of action against co-defendant Irvine Regional Medical Center. It also reversed summary adjudication of the informed consent cause of action against The Regents of the University of California and Drs. Shivkumar, Cesario, and Swerdlow. This is a survival claim in which Secarea seeks the damages recoverable by his wife for the claimed failure of the defendants to inform her of the risk of death from an atrio-esophageal fistula. The Court found there was a triable issue of fact as to whether the doctors should have informed Mrs. Secarea of the specific risk that led to her death. (Petitioner's Appendix, A-53 – A-54)

III. REASONS FOR DENYING THE WRIT

A. There Is No Evidence Mrs. Secarea Was the Victim of Medical Experimentation.

The entire basis for Secarea's request for this Court's intervention is his claim that his wife was the victim of medical experimentation, allegedly implicating a variety of federal statutes and regulations as well as federal Constitutional protections. No evidence was submitted to the Superior Court – or any other California court – substantiating that claim. In fact, the only available evidence completely refutes that claim.

In opposition to the Summary Judgment Motions, Secarea submitted a medical journal Abstract and an email to him from Dr. Swerdlow. That evidence is discussed above; it establishes that Mrs. Secarea was not part of any study of the benefits of using a temperature probe in an effort to avoid an atrio-esophageal fistula. The Abstract referred to 12 patients studied; according to Dr. Swerdlow's email to Secarea, Mrs. Secarea was the 14th person on whom the probe was used. After completing the study of twelve patients, the physicians determined there was potential benefit from the use of the probe and published their results. (Petitioner's Appendix, B-243) Therefore, Mrs. Secarea was a beneficiary of the information learned in the earlier study, not a participant in it; unfortunately even the use of the temperature probe was not sufficient to avoid the occurrence of an atrio-esophageal fistula, a known risk of cardiac ablation.

The expert evidence submitted by Dr. Swerdlow and the Regents, Dr. Shivkumar, and Dr. Cesario established that all those defendants complied with the applicable standard of care in the performance of the cardiac ablation and in the obtaining of Mrs. Secarea's Consent. (Petitioner's Appendix, B-171, et seq., B-179, et seq.) Secarea submitted no expert testimony refuting that evidence. (Petitioner's Appendix, B-197, et seq.) The only competent evidence before the Superior Court established defendants' entitlement to judgment.

There is no evidence in the record from which it might be concluded that Mrs. Secarea was the victim of unconsented medical experimentation; the Superior Court flatly rejected this assertion and the Court of Appeal affirmed that finding.

B. No Issue of Federal Law is Presented.

There is no Federal issue presented by this case. The United States Constitution, Article III, Section 2 empowers federal courts to adjudicate "all Cases, in law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority." Thus, federal courts are courts of limited jurisdiction. Secarea's assertion that this Court's intervention is appropriate because of supposed violations of various Constitutional protections and Federal statutes and regulations is without any support in the record before the California Superior Court.

This is a quintessentially State law tort case; the questions of appropriate provision of medical care and obtaining of sufficient informed consent as raised in this case implicate no federal interests. Each state has its own body of statutory and decisional law governing these issues. (See, e.g., *Cobbs v. Grant*, 8 Cal. 3d 229 (1972))

It is not the function of this Court to oversee the rulings of every state and federal trial court in the land. As Justice Rehnquist noted in *The Supreme Court How It Was How It Is* (1987), the Supreme

Court "seeks to pick, from the several thousand cases it is annually asked to review, those cases involving unsettled questions of federal constitutional or statutory law of general interest." (p. 269) Since no unsettled question of federal law is presented in this Petition, it should be denied.

C. Petitioner May Not Rely on Evidence Improperly Submitted to This Court.

Much of the "evidence" included in Secarea's appendices was not submitted to the California Superior Court (Petitioner's Appendix, B-251 – B-401). Secarea's Request for Judicial Notice of those documents three days before oral argument in the California Court of Appeal was denied by the Court of Appeal. (Petitioner's Appendix, A-60, A-61) None of the information in that Request for Judicial Notice was presented to the Superior Court. The deposition of Dr. Cesario which is referenced in those documents (Petitioner's Appendix, B-355 – B-401) was taken after judgment was entered against Secarea as to The Regents of the University of California, and Drs. Shivkumar, Cesario, and Swerdlow. Supreme Court Rule 12(7) permits a party to cite or quote from the record. The documents appearing at B-251 – B-401 are not part of the record in this matter; reference to them is therefore improper.

D. There is No Split in Authority on a Question of Federal Law in This Case. Petitioner is Seeking Review of the Factual Findings of the Trial Court.

Petitioner has cited no cases demonstrating any split in authority as to any question of federal law in this case. (Supreme Court Rule 10(a) and (b)) This Petition misconceives the role of this Court. It seeks a review of the factual findings of the Orange County Superior Court, as already reviewed and partially affirmed by the California Court of Appeal, Fourth District, Division Three.

E. Certiorari Should Be Denied Because Petitioner's Claim is Factbound and Unlikely to Recur.

The factual recitals set forth above demonstrate the factbound nature of petitioner's claims. Contrary to Secarea's assertion that this case represents issues of nationwide interest, this case involves an unusual fact pattern not likely to recur. The issues in this case are distinctively issues of California state law which depend entirely upon the unique facts presented in evidence to the Superior Court. No Federal interests are implicated in this case. Secarea's assertion that his wife was a victim of medical experimentation is flatly not true. His claim that others are also victims of medical experimentation is unsupported by the record in this matter. Given the factbound nature of Secarea's claims and the unlikelihood of a recurrence of the fact pattern in this case, this Petition should be

denied. (*Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955); *Buford v. U.S.*, 532 U.S. 59 (2000))

F. None of Petitioner's Four Questions Relate to Dr. Swerdlow.

Secarea's Petition raises four questions for this Court's consideration. Questions 1, 2 and 4 are at most potentially only applicable to the co-defendants in this action. As noted above, Dr. Swerdlow is a physician in private practice in the County of Los Angeles. He is not an employee of any State entity; therefore, his conduct does not constitute "state action." *Spencer v. Lee*, 864 F.2d 1376 (1989).

Question 3 addresses an evidentiary ruling which Secarea erroneously believes was related to the Declaration of Dr. Natale, co-defendants' expert witness. A careful reading of the record of the Superior Court demonstrates that in fact the objections which were discussed by the Superior Court and the Court of Appeal related to the defendants' objections to the evidence submitted by Secarea and not to any objection raised by Secarea as to defense evidence.

Even if Secarea were correct in believing that the Superior Court's ruling on those objections and the refusal to hear additional argument related to the Natale Declaration, that conduct is irrelevant to Dr. Swerdlow. Secarea does not raise any issue as to the expert declaration Dr. Swerdlow submitted in support of his Motion for Summary Judgment.

Therefore, in summary, the questions presented by Secarea do not apply to Dr. Swerdlow.

IV. CONCLUSION

For all the reasons set forth above, Respondent Charles Swerdlow, M.D. respectfully submits that this Petition should be denied.

Respectfully submitted,

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Counsel for Respondent,
Charles Swerdlow, M.D.

DATED: August 27, 2009